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THE INSURANCE CLAIMS PROCESS IN MISSOURI

RICHARD B. HAGEDORN*

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With the pervasiveness of liability insurance in modern society, the insurance claims process has become an important adjunct to the law of tort liability. Whether he represents plaintiff, defendant, or an insurance company, any lawyer who litigates tort claims must be familiar with the insurance claims process and its pitfalls. This article will examine insurance

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claims law in Missouri with a view to providing the Missouri practitioner a tool for sharpening his skills within the insurance claims process.

I. CLAIMS PROCESSING REQUIREMENTS AND THE CONSEQUENCES OF NONCOMPLIANCE

A. *The Requirements*

Insurance contracts often contain clauses dictating the way by which the claim is to be presented to the insurance company.¹ Many examples can be noted by a brief review of policy forms used in Missouri.² Most of the clauses pertain to such requirements as prompt presentment of claims, assistance and cooperation of the insured, and arbitration of claims disputes. Occasionally the requirement will be imposed by statute.

The fire insurance policy form used in Missouri is a prime example. Written notice of loss is required immediately and proof of loss must be submitted within a specified time period. The insured must also be prepared to submit to examinations under oath regarding the loss and must produce for examination books of account and the like. Further, impartial appraisers are to be appointed to value the loss in the event of dispute. Under Missouri law the claimant must file with the insurance company a statement that no taxes are owed on the damaged property.³ Similar provisions can be found in other Missouri policy forms such as those used in life insurance, accidental death insurance, uninsured motorists insurance, and professional liability insurance.

B. *The Consequences of Noncompliance*

Provisions concerning the way in which claims are to be presented to the insurer are often said to impose a qualification on the claimant's ability to successfully pursue a claim, as opposed to an obligation. In other words, these provisions merely afford the insurer a defense against payment of a claim and do not give it an action for affirmative relief in the event the claimant fails to comply with a given claims requirement of the policy.⁴

The question of when a defense to the liability of the insurer is raised by noncompliance has often been litigated. Is any noncompliance a defense, or must the noncompliance have somehow prejudiced the insurer? A requirement of prejudice is not normally found in the policy itself;

1. See R. KEETON, BASIC TEXT ON INSURANCE LAW 440 (1971). See also 13 & 14 R. ANDERSON, COUCH CYCLOPEDIA OF INSURANCE LAW §§ 49, 50, 51:100-239 (2d ed. 1959); 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4731-4787 (2d ed. 1962).

2. For additional specific discussion of Missouri insurance policy forms, see Mo. Bar C.L.E., *Missouri Insurance Practice* (2d ed. 1977).

3. See RSMo § 139.110 (1969).

4. R. KEETON, *supra* note 1, at 440.

rather, it is recognized by the majority of the courts as a form of judicial regulation.⁵

The Missouri courts consider prejudice as an important factor to be considered and appear to fall within this majority position that imposes the requirement of prejudice to the insurer in the absence of a forfeiture clause before noncompliance can afford the insurer a defense.⁶ Missouri views such requirements in most instances as a mere qualification and not an obligation; the policy provision thus falls short, in most instances, of being construed as a condition precedent to the liability of the insurer.

There is always the possibility that such claims processing requirements might be altogether waived by the insurer. This is particularly the case where the insurer expressly denies liability before the required act is to occur.⁷ In at least three Missouri cases, the courts have recognized that a waiver of a claims processing requirement can occur where the insurer denied liability.⁸

The degree of impact on the rights of the parties resulting from the requirement of prejudice depends in large part on the allocation of the burden of proving or disproving the existence of prejudice.⁹ Many courts have adopted the position that prejudice is presumed from lack of compliance thus placing the burden of disproving prejudice on the claimant; however, a few courts have placed the burden of proving prejudice on the insurer.¹⁰ It would appear that when the burden is placed on the insurer the impact of the prejudice doctrine is great, while if it is placed on the claimant it is less substantial.¹¹ Missouri, apparently placing emphasis on

5. See *id.* at 441. See also 14 R. ANDERSON, *supra* note 1, at §§ 49:421, 51:101; 8 J. APPLEMAN, *supra* note 1, at § 4773.

6. See, e.g., *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15 (Mo. 1969); *McNeal v. Manchester Ins. & Indem. Co.*, 540 S.W.2d 113 (Mo. App., D. St. L. 1976); *Cox v. Washington Nat'l Ins. Co.*, 520 S.W.2d 76 (Mo. App., D.K.C. 1974); *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205 (St. L. Mo. App. 1970); *Schultz v. Queen Ins. Co.*, 399 S.W.2d 230 (St. L. Mo. App. 1965); *Halferty v. National Mut. Cas. Co.*, 296 S.W.2d 130 (K.C. Mo. App. 1956); *St. Paul & K.C.S.L. R.R. v. United States Fidelity & Guar. Co.*, 231 Mo. App. 613, 105 S.W.2d 14 (K.C. 1937); *Walker ex rel. Foristel v. American Auto. Ins. Co.*, 229 Mo. 1202, 70 S.W.2d 82 (St. L. 1934).

7. See 14 R. ANDERSON, *supra* note 1, §§ 51:114-:116, 49:751-:924; 8 J. APPLEMAN, *supra* note 1, §§ 4747, 4786.

8. See *Wilson & Co. v. Hartford Fire Ins. Co.*, 300 Mo. 1, 254 S.W. 266 (1923); *Otto v. Farmers Ins. Co.*, 558 S.W.2d 713 (Mo. App., D.K.C. 1977); *Cohen v. Fort Dearborn Cas. Underwriters*, 221 Mo. App. 741, 285 S.W. 1024 (K.C. 1926).

9. See 8 J. APPLEMAN, *supra* note 1, § 4732; R. KEETON, *supra* note 1, at 441-45.

10. See 8 J. APPLEMAN, *supra* note 1, § 4732.

11. See, e.g., *Billington v. Interinsurance Exch.*, 71 Cal. 2d 728, 456 P.2d 982, 79 Cal. Rptr. 326 (1969); *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 384 P.2d 155, 32 Cal. Rptr. 827 (1963); *Western Mut. Ins. Co. v. Baldwin*, 258 Iowa 460, 137 N.W.2d 918 (1965); *Mountainair Mun. School v. United States Fidelity & Guar. Co.*, 80 N.M. 761, 461 P.2d 410 (1969).

the requirement of prejudice, has allocated the burden of proving prejudice to the insurer.¹²

All of this begs a major question regarding the prejudice doctrine. What is the standard of prejudice? Numerous standards have evolved. Some courts require a showing that due to the noncompliance the result *was* different in a particular case, with relief being limited to the difference in result shown. Others require only a showing of a *substantial likelihood* that the result would have been different but for the noncompliance. The majority simply requires a showing that the claim is substantially more dangerous, onerous, or troublesome because of the claimant's noncompliance.¹³ The position of the Missouri courts regarding the standard of prejudice appears to coincide with the first or second of the three positions.¹⁴ Arguably, it seems preferable in most situations to take the less rigorous posture of the majority third position mentioned above:

There is good reason for declining to enforce a rigorous requirement that the insurer prove that a different result has occurred in a particular case because of the insured's breach. In relation to a defense of late claim, for example, the very delay of which the insurer complains has deprived it of the normal opportunity for early investigation that might have disclosed defenses, if they existed. Thus, it can never be known whether the case is in fact one in which the result would have been different. If the insurer is deprived of its defense unless it can prove that a different result would have come about in a particular case, it must pay a whole body of claims some of which it could have defeated but for the delay of presentment. Narrowing the insurer's defense in this way would produce injustice not only to the insurer but also to other policyholders whose premiums must pay for this risk if the insurer is required to bear it.¹⁵

In any event, Missouri's apparent non-adoption of the majority position increases the impact of the prejudice requirement on the insurer's potential defense of noncompliance.

C. Arbitration—The Special Claims Processing Requirement

Special mention should be made of clauses in insurance policies which require resolution of claims disputes by arbitration. It is well known that courts have traditionally expressed concern over binding arbitration

12. See *Cox v. Washington Nat. Ins. Co.*, 520 S.W.2d 76 (Mo. App., D.K.C. 1974); *Dixon v. United States Fidelity & Guar. Co.*, 155 S.W.2d 313 (St. L. Mo. App. 1941); *St. Paul & K.C.S.L. R.R. v. United States Fidelity & Guar. Co.*, 231 Mo. App. 613, 105 S.W.2d 14 (K.C. 1937); *Walker ex rel. Foristel v. American Auto. Ins. Co.*, 229 Mo. App. 1202, 70 S.W.2d 82 (St. L. 1934).

13. See R. KEETON, *supra* note 1, at 442-44.

14. See *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15 (Mo. 1969); *Walker ex rel. Foristel v. American Auto. Ins. Co.*, 229 Mo. App. 1202, 70 S.W.2d 82 (St. L. 1934).

15. R. KEETON, *supra* note 1, at 444.

clauses in contracts. Such clauses in the insurance policy have been treated with similar concern and in some instances with notable hostility.¹⁶ A basic fear exists that the parties will lose their day in court. In particular, constitutional problems are raised when the arbitration clause affects third party rights or when the only insurance coverage available includes arbitration clauses as a standard part of the policy form.¹⁷ The courts are split as to the enforceability of arbitration clauses with most jurisdictions resorting to legislation to determine enforceability.¹⁸

Arbitration clauses are occasionally found in Missouri policy forms; most notably, an arbitration clause may be placed in the uninsured motorist section of the standard automobile insurance policy. Missouri has by statute taken the position that the clause is unenforceable before award.¹⁹ In light of this apparent legislative mandate, little change on the arbitration issue can be expected. Since the arbitration clause is unenforceable, noncompliance with such a clause before award is obviously of no consequence.

II. NONPAYMENT AND LATE PAYMENT OF A CLAIM BY THE INSURER

While the preceding section concentrated on requirements applicable to the claimant, this section turns to a requirement applicable to the insurer. Generally, the insurer is required to pay claims promptly. Failure to do so without justification results in potential liability of the insurer under statutory law in many jurisdictions.²⁰ When is an insurer justified in not paying a claim or in delaying payment of the claim? The test varies from a reasonableness test, to a bad faith test, to a mere requirement of denial of payment test, depending upon the statute of the local jurisdiction. In Missouri, the legislature has provided as follows:

In any action, suit or other proceeding instituted against any insurance company, . . . upon any contract of insurance issued . . . in this state . . . to a resident of this state . . . if the insurer has failed

16. See *id.* at 452.

17. *Id.*

18. See, e.g., *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969); *Boughton v. Farmers Ins. Exch.*, 354 P.2d 1085 (Okla. 1960); *Barnhart v. Civil Serv. Employees Ins. Co.*, 16 Utah 2d 223, 398 P.2d 873 (1965). See also CAL. INS. CODE § 11580.2(f) (West Supp. 1979); OR. REV. STAT. § 743.792(1)(a) (1969).

19. See RSMo § 435.010 (1969); *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Craig*, 364 S.W.2d 343 (Spr. Mo. App. 1963). See also Annot., 24 A.L.R.3d 1325, 1334 (1969). It should be noted that once an award is made by an arbitrator, the award will be enforced. See RSMo § 435.020 (1969). It should be noted also that Missouri has treated *appraisal* clauses in insurance policies as enforceable. See *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (1920).

20. See 16 R. ANDERSON, *supra* note 1, § 58; 22 J. APPLEMAN, *supra* note 1, § 14532.

or refused for a period of thirty days after due demand therefore prior to the institution of the action, suit or proceeding, to make payment under and in accordance with the terms and provisions of the contract of insurance, and it shall appear from the evidence that the refusal was vexatious and *without reasonable cause*, the court or jury may, in addition to the amount due under the provisions of the contract of insurance and interest thereon, allow the plaintiff damages for vexatious refusal to pay and attorney's fees as provided in section 375.420.²¹

While the above-mentioned statutes are strictly construed due to their highly penal nature,²² Missouri courts have made it clear that the question of reasonableness will be determined as the facts would have appeared to a reasonable man before trial.²³ Each case is of course to be considered on its own merits.²⁴

The question of who may sue under the Missouri statute has been the subject of litigation. The courts have held that only the policyholder or his assignee may sue²⁵ while expressly denying a judgment creditor of the policyholder the use of the statute.²⁶

III. THE LIABILITY INSURER'S DUTY OF DEFENSE

Within the claims process, there is no more formidable duty than the liability insurer's duty to defend its insured. The duty of defense is the result of a right given the liability insurer—the right to control the defense of the claim and thereby protect its own interests as well as those of the insured.²⁷ Since this right is crucial to the insurer, the corresponding duty is accepted by the liability insurer pursuant to policy provisions even if the claim is groundless, false, or fraudulent.²⁸ Such agreements to defend have

21. RSMo § 375.296 (1969) (emphasis added).

22. See *Howard v. Aetna Life Ins. Co.*, 350 Mo. 17, 164 S.W.2d 360 (1942); *Housing Auth. v. Bauman*, 512 S.W.2d 436 (Mo. App., D.K.C. 1974).

23. See *Pfingston v. Franklin Life Ins. Co.*, 330 S.W.2d 806 (Mo. 1969); *Housing Auth. v. Bauman*, 512 S.W.2d 436 (Mo. App., D.K.C. 1974); *Duckworth v. United States Fidelity & Guar. Co.*, 452 S.W.2d 280 (St. L. Mo. App. 1970).

24. See, e.g., *Cox v. Washington Nat. Ins. Co.*, 520 S.W.2d 76 (Mo. App., D.K.C. 1974); *Citizens Discount & Inv. Corp. v. Dixon*, 499 S.W.2d 231 (Mo. App., D. St. L. 1973); *Locke Distrib. Co. v. Hartford Acc. & Indem. Co.*, 407 S.W.2d 658 (St. L. Mo. App. 1966); *Hammontree v. Central Mut. Ins. Co.*, 385 S.W.2d 661 (Spr. Mo. App. 1965); *Irelan v. Standard Mut. Assoc.*, 379 S.W.2d 815 (Spr. Mo. App. 1964); *Evans v. Great N. Life Ins. Co.*, 237 Mo. App. 317, 167 S.W.2d 118 (K.C. 1942).

25. See *Still v. Traveler's Indem. Co.*, 374 S.W.2d 95 (Mo. 1963).

26. See *Corder v. Morgan Roofing Co.*, 355 Mo. 127, 195 S.W.2d 441 (1963).

27. See 7A J. APPLEMAN, *supra* note 1, § 4681; 14 R. ANDERSON, *supra* note 1, § 51.32; R. KEETON, *supra* note 1, at 483-84.

28. See R. KEETON, *supra* note 1, at 462.

been specifically upheld in Missouri upon the rationale that the insurer has a vital interest in the defense of a claim.²⁹

A. *When the Liability Insurer Must Defend; the Standard of Conduct If It Defends*

Whether or not the liability insurer must defend depends upon the coverage of the policy and the nature of the claim which is usually established by the pleadings.³⁰ This general principle is firmly entrenched in Missouri law,³¹ but application of the principle is a difficult matter. Typical of the situations in which problems may arise are cases where the pleadings take no position one way or the other on some point determinative of coverage; or where the pleadings allege by surplusage only facts that are decisive of coverage; or where the pleadings include claims within and outside the coverage; or where the actual circumstances known by the insurer fall within coverage but the facts alleged in the pleadings fall outside of coverage; or where no pleadings have as yet been filed.³²

In Missouri, it is clear that the general principle of when the insurer must defend will be superseded should the insurer have knowledge of actual facts that would bring the claim within the coverage. Indeed, even where an insurer's reasonable investigation would have uncovered such facts, the duty to defend is present.³³ Thus, if the pleadings do not allege a cause of action within the coverage of the policy, but the insurer knows of facts that would bring the claim within the coverage, the duty to defend in most instances is present. Additionally, this could arguably place a duty of defense on the insurer even prior to the filing of the claimant's pleading. On the other hand, if the claimant's pleading alleges facts that if proven would be within the coverage of the liability policy, the insurer must

29. See *General Serv. Corp. v. Allhoff Bros.*, 139 S.W.2d 1062 (St. L. Mo. App. 1940).

30. See 7 A. J. Appleman, *supra* note 1, §§ 4682-4686; 14 R. ANDERSON, *supra* note 1, §§ 51.32-.49.

31. See, e.g., *Ward v. State Farmers Mut. Tornado Ins. Co.*, 441 S.W.2d 1 (Mo. 1969); *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968); *Benningfield v. Avemco Ins. Co.*, 561 S.W.2d 736 (Mo. App., D.K.C. 1978); *Ranger Ins. Co. v. Silverthorn*, 553 S.W.2d 530 (Mo. App., D.K.C. 1977); *Moore v. MFA Mut. Ins. Co.*, 422 S.W.2d 357 (K.C. Mo. App. 1967); *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (K.C. Mo. App. 1965); *Northwestern Mut. Ins. Co. v. Haglund*, 387 S.W.2d 230 (K.C. Mo. App. 1965); *MFA Ins. Co. v. Lawson*, 336 S.W.2d 123 (K.C. Mo. App. 1960); *Simpson v. American Auto. Ins. Co.*, 327 S.W.2d 519 (St. L. Mo. App. 1959); *Interstate Oil Co. v. Equity Mut. Ins. Co.*, 183 S.W.2d 328 (K.C. Mo. App. 1944).

32. See R. KEETON, *supra* note 1, at 462-77 for an excellent discussion of these problem areas.

33. See *Marshall's U.S. Auto Supply v. Maryland Cas. Co.*, 354 Mo. 455, 189 S.W.2d 529 (1945); *State ex rel. Interstate Oil Co. v. Bland*, 354 Mo. 622, 190 S.W.2d 227 (1945); *Hawkeye-Security Ins. Co. v. Iowa Nat. Mut. Ins. Co.*, 567 S.W.2d 719 (Mo. App., D.K.C. 1978); *City of Palmyra v. Western Cas. & Sur. Co.*, 477 S.W.2d 428 (Mo. App., D. St. L. 1972).

always defend even if it has knowledge of facts that would take the claim outside the policy's coverage.³⁴

A special problem is raised where several causes of action are asserted by the claimant. Is the insurer's duty to defend, and likewise the insurer's right to control the defense, present if some of the causes of action are within the policy's coverage and some are outside the coverage? It is clear that the liability insurer in Missouri must still defend its insured.³⁵ But neither the insurer nor the insured can exclude the other in the defense of the total action.³⁶ Such cases also present the ugly specter of a conflict of interest making it both advisable and mandatory that the insurer advise the insured of his right to separate counsel. A similar problem is raised where more than one liability insurer may be liable on a single cause of action. Here the companies cannot exclude each other; they must cooperate in the defense.³⁷

Underlying the determination of when the liability insurer must defend is the claims processing requirement that the insured assist and cooperate with the insurer in its defense. To have an effect on the duty of the insurer to defend, the lack of assistance or cooperation must be prejudicial to the insured.³⁸ Additionally, Missouri makes it clear that the insurer must take reasonable steps to obtain the insured's cooperation.³⁹ Assuming the insured breaches this duty and thereby prejudices the insurer, the insurer's duty to defend is released.⁴⁰

Also underlying the determination of when the liability insurer must defend is the claims settlement process itself. What is the effect of an insurer's tender or payment of the policy's limits—is the insurer's duty to defend discharged on the ground the insurer no longer has a stake in the defense? While research uncovers no Missouri authority in point, there are a few cases from other jurisdictions that touch on the problem. The cases reflect inconsistent results that in large part depend upon the specific policy provision.⁴¹

If the liability insurer is uncertain whether the claim will ultimately fall within the policy's coverage, it has two alternatives. First, it could bring an action for a declaratory judgment by which a court would make

34. See *Miste v. Ogle*, 293 S.W.2d 330 (Mo. 1956); *Benningfield v. Avemco Ins. Co.*, 561 S.W.2d 736 (Mo. App., D.K.C. 1978).

35. See *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974).

36. See *Compton Heights Laundry Co. v. General Acc., Fire & Life Assur. Corp.*, 195 Mo. App. 313, 190 S.W. 382 (Spr. 1917).

37. See 7A J. APPLEMAN, *supra* note 1, § 4681.

38. See *MFA Mut. Ins. Co. v. Thost*, 561 S.W.2d 431 (Mo. App., D. St. L. 1978).

39. See *Kitchen v. McCullough*, 428 S.W.2d 907 (K.C. Mo. App. 1968).

40. See *Quisenbury v. Kartsonis*, 297 S.W.2d 450 (Mo. 1957); *Lenhart v. Rich*, 384 S.W.2d 812 (K.C. Mo. App. 1964); *Finkle v. Western Auto. Ins. Co.*, 224 Mo. App. 288, 26 S.W.2d 843 (St. L. 1930).

41. See R. KEETON, *supra* note 1, at 479-82. See discussion Part V(D) *infra*.

the determination. The obvious problems here are the expense of the additional suit and the potential loss in time in processing the claim at issue. Second, it could defend. However, to defend can be construed as a waiver of the insurer's right to thereafter contest its liability even where the insured has breached a condition of the policy.⁴² Missouri courts have so held where the insurer had knowledge of noncoverage under the policy.⁴³ The insurer, however, may defend without waiving its rights to later contest its liability if it defends pursuant to a non-waiver of rights agreement with the insured or at least notifies the insured of its reservation of rights.⁴⁴

If the liability insurer does defend its insured, the standard of its conduct comes into question.⁴⁵ Missouri has indicated that the insurer must defend with due care and in good faith.⁴⁶ This standard appears to be consistent with the majority of jurisdictions throughout the United States.⁴⁷

B. *Consequences of an Improper Refusal to Defend*

Assuming the duty of the liability insurer to defend is present, serious consequences will result if the insurer refuses to defend.⁴⁸ Generally, from a national viewpoint, the insurer must pay the amount of the judgment (up to the policy limits) ultimately rendered against the insured, even though the insurer was by its absence not in control of the defense.⁴⁹ There is even some authority that requires the insurer to pay for a judgment in excess of the policy limits if the insurer's failure to defend caused the excess judgment.⁵⁰ The insurer must also pay the insured's attorney's fees and other costs incurred in defending the action of the claimant.⁵¹ The insurer may be liable for all of the above even if the insured settles the claim prior to judgment.⁵² If the insurer refuses payment or delays payment

42. See 7A J. APPLEMAN, *supra* note 1, § 4692.

43. See *State Farm Mut. Auto. Ins. Co. v. MFA Mut. Ins. Co.*, 485 S.W.2d 397 (Mo. 1972); *Kitchen v. McCullough*, 428 S.W.2d 907 (K.C. Mo. App. 1968); *Luck v. Fort Dearborn Ins. Co.*, 54 S.W.2d 757 (St. L. Mo. App. 1932).

44. See 7A J. APPLEMAN, *supra* note 1, § 4694; 14 R. ANDERSON, *supra* note 1, §§ 51:77-87. For Missouri authorities, see *Linenschmidt v. Continental Cas. Co.*, 356 Mo. 914, 204 S.W.2d 295 (1947); *Myers v. Continental Cas. Co.*, 223 Mo. App. 781, 22 S.W.2d 867 (St. L. 1929); *Royle Mining Co. v. Fidelity & Cas. Co.*, 161 Mo. App. 185, 142 S.W. 438 (Spr. 1912).

45. For general discussion, see 7A J. APPLEMAN, *supra* note 1, § 4687; 14 R. ANDERSON, *supra* note 1, § 51:74; R. KEETON, *supra* note 1, at 471.

46. See *St. Joseph Transfer & Storage Co. v. Employers Indem. Corp.*, 224 Mo. App. 221, 23 S.W.2d 215 (K.C. 1930).

47. See authorities cited note 44 *supra*.

48. See 7A J. APPLEMAN, *supra* note 1, §§ 4689, 4691; 14 R. ANDERSON, *supra* note 1, §§ 51:50-73.

49. See R. KEETON, *supra* note 1, at 485.

50. *Id.*

51. *Id.* at 484.

52. *Id.* at 486. See also 7A J. APPLEMAN, *supra* note 1, § 4690.

unreasonably, the insurer may also incur an additional statutory penalty.⁵³

In Missouri the ramifications of a breach of a duty to defend are evident from a review of relevant case law. First, refusal to defend waives all other relevant claims requirements contained within the policy.⁵⁴ Second, the liability insurer will be liable for the amount of the judgment up to the policy limits.⁵⁵ While research discloses no cases holding the breaching liability insurer liable for judgment in excess of the policy limits, the argument appears open if the breach of the duty to defend caused the excess judgment. Third, the insurer in Missouri will be required to reimburse the insured for his attorney's fees and other costs of defense.⁵⁶ Fourth, such liability remains where the insured settled the claim before judgment.⁵⁷ Finally, the insurer, if it refuses such payments or delays in making such payments unreasonably, will be liable for the statutory penalties set forth in RSMO sections 375.296 and 375.420. Thus, as can be seen, the decision to refuse to defend the insured should be considered carefully to avoid these adverse consequences.

IV. EXCESS LIABILITY—THE LIABILITY INSURER'S DUTY TO THE INSURED REGARDING SETTLEMENT

As discussed in Part III, the liability insurer has a vital interest in controlling the defense of its insured when a claim is made against the insured that falls within the policy's coverage. Because of this interest the liability insurer is given the right to control the defense, but with it takes on the corresponding duty to defend with due care and in good faith. As a further incident of this interest, the liability insurer is given the right to control settlement and along with it the corresponding duty to settle the claim with due care and in good faith. If the insurer fails to settle the claim within the policy limits for failure to exercise due care and good faith, and a judgment thereafter results in excess of the policy limits, the insurer will be liable for the entire judgment.⁵⁸ Missouri has recognized such liability resulting from the right to control settlement of a claim and a breach of a duty to do so in good faith.⁵⁹

53. See discussion Part II *supra*.

54. See *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974).

55. See *Preferred Risk Mut. Ins. Co. v. Main*, 295 F. Supp. 207 (W.D. Mo. 1968); *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (K.C. Mo. App. 1965).

56. See *Centennial State Bank v. SEK Constr. Co.*, 518 S.W.2d 143 (Mo. App., D.K.C. 1974).

57. See *National Battery Co. v. Standard Acc. Ins. Co.*, 226 Mo. App. 351, 41 S.W.2d 599 (K.C. 1931).

58. See 14 R. ANDERSON, *supra* note 1, §§ 51:1-30; 7A J. APPLEMAN, *supra* note 1, §§ 4711-4715; R. KEETON, *supra* note 1, at 508-21.

59. See *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950); *Carthage Stone Co. v. Travelers' Ins. Co.*, 274 Mo. 537, 203 S.W. 822 (En Banc 1918); *Dyer v. General Am. Life Ins. Co.*, 541 S.W.2d 702 (Mo. App., D. St. L. 1976); *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (K.C. Mo. App. 1965).

A. *The Standard of Conduct and Nature of the Duty*

It has been correctly stated that there are two basic questions pertaining to the standard of conduct to which the liability insurer will be held in the performance of its duty to the insured regarding settlement. First, is the test one of bad faith or one of negligence? Second, what degree of consideration must the liability insurer give to the insured's interest as opposed to its own?⁶⁰

In Missouri the test is clearly one of bad faith; use of a standard related to the concept of negligence has been expressly rejected.⁶¹ Bad faith is evidenced by the intentional disregard of the financial interests of the insured.⁶² Whether or not equal consideration must be given to the insured's financial interests is not clear in Missouri, although the prevailing view in other jurisdictions is that the insurer must give the insured's financial interest at least equal consideration.⁶³ However, it has been held in Missouri that a total disregard of the insured's financial interest is evidence of bad faith.⁶⁴ The burden of proving bad faith is of course on the insured.⁶⁵

The action brought by the insured sounds in tort.⁶⁶ The Missouri Court of Appeals has recently articulated the elements of this cause of action.⁶⁷ According to the court of appeals the insurer must have assumed control over the negotiation, settlement, and legal proceedings brought against the insured. However, it must be noted that at least in one case where the insurer improperly refused to defend, it was still held to a duty of good faith regarding settlement.⁶⁸ The court of appeals also indicated that the insured must have demanded that the insurer settle the claim. This element of the cause of action tends to restrict the availability of the action in comparison with some jurisdictions. Indeed, some jurisdictions have expressly held that neither a demand by the insured that the company settle, nor an offer by the claimant, are prerequisites of liability in excess of policy limits.⁶⁹ Finally, the insured must establish that the insurer refused to settle within the limits of the policy in bad faith.

What if there is an offer to settle in excess of the policy limits but the insured is willing to pay the excess? The duty to settle can still be present.⁷⁰

60. See R. KEETON, *supra* note 1, at 510-11.

61. *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950); *Dyer v. General Am. Life Ins. Co.*, 541 S.W.2d 702 (Mo. App., D. St. L. 1976); *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (K.C. Mo. App. 1965).

62. See *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950).

63. See R. KEETON, *supra* note 1, at 511.

64. See *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950).

65. *Id.*

66. *Id.*

67. See *Dyer v. General Am. Life Ins. Co.*, 541 S.W.2d 702 (Mo. App., D. St. L. 1976).

68. See *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (K.C. Mo. App. 1965).

69. See R. KEETON, *supra* note 1, at 812-13.

70. *Id.*

However, the insurer must be careful not to solicit a contribution from its insured without making it clear it is ready to contribute the entire policy limit. To do otherwise evidences the insurer's preference to its own interests over the insured's.⁷¹ This point has been emphasized in a Missouri case.⁷²

B. *Consequences of Breach by the Liability Insurer of Its
Duty to the Insured Regarding Settlement*

If the insured establishes a breach of the settlement duty the measure of damage is the excess of the judgment over the policy limit.⁷³ This basic principle is recognized in Missouri.⁷⁴ Some jurisdictions have also allowed recovery for mental suffering.⁷⁵ Missouri has indicated that punitive damages will be recoverable if the insurer acted maliciously, willfully, intentionally, or recklessly, although damages pursuant to RSMO sections 315.296 and 375.420 for vexatious refusal to pay a claim have been held inapplicable.⁷⁶

The question of who may sue for breach of the settlement duty must also be answered. Clearly the insured may sue. However, in Missouri, the judgment creditor of the insured may not sue on this cause of action.⁷⁷ Whether an assignee of the insured may sue is undecided in Missouri; other jurisdictions are split on the issue.⁷⁸

A related question can also be raised as to when the insured may bring suit for breach of the settlement duty. Must the insured have paid something on the judgment, or is the mere fact of the judgment having been rendered against him sufficient? This question has not been raised in Missouri.⁷⁹ However, one author suggests the following as a reasonable resolution of the problem:

Is it possible to formulate a workable doctrine that fully protects the insured from loss and yet does not in fact result in either a penalty to the insurer or a windfall to the claimant? Perhaps so. The aim should be to make the insured whole (placing him in the same position he would have been in had there been no breach by

71. *Id.*

72. *See* *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950).

73. *See* R. KEETON, *supra* note 1, at 515.

74. *See* cases cited note 61 *supra*.

75. *See* R. KEETON, *supra* note 1, at 515.

76. *See* *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950).

77. *See* *Linder v. Hawkeye-Security Ins. Co.*, 472 S.W.2d 412, 415 (Mo. En Banc 1971).

78. For a case denying an assignee the right to sue, *see* *Dillingham v. Tri-State Ins. Co.*, 381 S.W.2d 914 (Tenn. 1964); for a case allowing an assignee to sue, *see* *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. 1976). The latter probably represents the majority position. *See* R. KEETON, *supra* note 1, at 518 n.16.

79. *See* R. KEETON, *supra* note 1, at 519. *See* generally *id.* at 516.

failure to settle) at minimum cost and without reducing the amount the claimant could have realized upon his rights against the insured if there had been no cause of action for liability in excess of policy limit . . . This might be done by permitting a single recovery against the insurer on the excess liability claim, at the instance of either the insured or the claimant, in an amount equal to the insurance and assets not exempt from legal process, and holding that the claimant's tort judgment against the insured is fully discharged by payment of this sum to the claimant either by the insured or by the insurer on the insured's behalf.⁸⁰

V. CONFLICTS OF INTEREST FOR THE INSURER WITHIN THE CLAIMS PROCESS

The claims process is replete with possible conflicts of interest for the insurer. This is particularly the case in the liability insurance field. Conflicts may be raised that affect the presentment of claims and defenses. They also can taint the settlement process. While it is impossible to consider all such potential conflicts, this section of the article will discuss some of the common situations that result in a potential conflict of interest for the insurer. It should be noted that where possible Missouri authority will be cited. However, to portray a more complete picture of conflict of interest within the claims process, this section will in large part be based on authority outside Missouri.

A. *Where More Than One Party to an Action Is Insured by the Same Insurer*

It is relatively common for more than one party in an action to be insured by the same insurance company. The plaintiff and the defendant, or co-defendants with antagonistic interests, may be insured by the same carrier particularly if that insurance carrier is a company of great size.

In such a situation a conflict inevitably must arise. For example, it is to the insurer's benefit that neither party recover from the other where the plaintiff and the defendant are both covered by the same insurer. Irrespective of any benefit to the insurer, where co-defendants have adverse interests but are covered by the same insurance carrier, the conflict is obvious.⁸¹

When such a conflict is present, each insured must select his own counsel and this will suffice to fulfill the insurer's duty with regard to representation.⁸² However, the insurer cannot control the representation

80. *But see* Wessing v. American Indem. Co., 127 F. Supp. 775 (W.D. Mo. 1955) (cause of action for at least nominal damages is alleged even though the plaintiff has not paid any part of the excess judgment).

81. For a good general discussion of this problem, *see* 7A J. APPLEMAN, *supra* note 1, § 4681 at 264 n.7.10.

82. *See, e.g.,* Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 394 P.2d

of that party due to the conflict.⁸³ The counsel must be paid for by the insurer.⁸⁴ The selection preferably should be made by the insured.⁸⁵ If, however, the insurer must make the selection of counsel, the counsel provided should not be associated with the firm representing the other party; in short, the counsel must truly be separate and independent.⁸⁶ Finally, immediate notice of the conflict should be given the insured so he has time to obtain separate counsel or to adequately prepare for the trial.⁸⁷

B. *Where an Action Involves Claims Within and Outside of the Policy's Coverage*

The insurer can find itself in a conflict of interest where the claimant has made claims against its insured, some of which fall within the policy's coverage and some of which do not fall within such coverage. Often the claim outside the coverage of the policy actually involves a specific exclusion.

Such a situation has arisen in Missouri. In *Compton Heights Laundry Company v. General Accident, Fire & Life Assurance Corporation Limited, of Perth Scotland*,⁸⁸ it was made clear that a conflict was present in such a situation. There, the court emphasized that each party could protect his own interest but neither could exclude the other from the defense of the case.

A more extensive analysis of how to deal with the problem was offered by a Rhode Island court.⁸⁹ An insured in such a circumstance may accept the services of the insurance company's attorneys after full disclosure of the conflict is made. However, as indicated in the *Compton* case, an insured may also refuse such services. The Rhode Island court indicated that if such a refusal occurs the insurer's desire to control litigation must yield to its obligation to defend. Two options then are present. First, the insured presumably could select his own attorney to represent him on all claims,

571, 39 Cal. Rptr. 731 (1964); *O'Morrow v. Borad*, 27 Cal. 2d 794, 161 P.2d 28, *aff'd*, 167 P.2d 483 (1946); *Yeomans v. Allstate Ins. Co.*, 130 N.J. Super. 48, 324 A.2d 906 (1974).

83. See *O'Morrow v. Borad*, 27 Cal. 2d 794, 161 P.2d 28, *aff'd*, 167 P.2d 483 (1946).

84. See *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976); *Rimar v. Continental Cas. Co.*, 50 App. Div. 2d 169, 376 N.Y.S.2d 309 (1975).

85. See *Jaeger v. Traveler's Ins. Co.*, 53 App. Div. 2d 637, 384 N.Y.S.2d 848 (1976); *Executive Aviation, Inc. v. National Ins. Underwriters*, 16 Cal. App. 3d 799, 94 Cal. Rptr. 347 (1971).

86. See *Hammitt v. McIntyre*, 114 Cal. App. 2d 148, 249 P.2d 885 (1952).

87. See *DeGraw v. State Sec. Ins. Co.*, 40 Ill. App. 3d 26, 351 N.E.2d 302 (1976).

88. 195 Mo. App. 313, 190 S.W. 382 (Spr. 1917).

89. See *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968).

the attorney being paid by the insurer. Second, and perhaps more likely, the insurer and the insured could both be represented by separate counsel—the scope of authority of each depending upon the nature of the claim that is within or outside the policy. Regardless of which option is taken by the parties, the Rhode Island court concluded that the insurer must be given the chance to approve selection of counsel although such approval cannot be unreasonably withheld.

It should be mentioned that a particularly common problem area within this topic is where the liability policy covers injuries negligently inflicted by the insured but not intentionally. A conflict of interest is present if the claimant asserts both bases of liability and should be approached as discussed above.⁹⁰

C. *Where the Claim is in Excess of Policy Limits*

Where the claimant asserts a claim that exceeds the policy limits, a conflict of interest arises for the insurer. The well-known case of *Murach v. Massachusetts Bonding & Insurance Company*⁹¹ established that it is the duty of the insurer to disclose the conflict to its insured and to advise the insured to retain separate counsel.

It should also be noted that the American Bar Association in conjunction with the Conference Committee on Adjustors, have adopted the following principle pertaining to this conflict of interest:

The companies and their representatives, including attorneys, will inform the policyholder of the progress of any suit against the policyholder and its probable results. If any diversity of interest shall appear between the policyholder and the company, the policyholder shall be fully advised of the situation and invited to retain his own counsel. Without limiting the general application of the foregoing, it is contemplated that this will be done in any case in which it appears probable that an amount in excess of the limit of the policy is involved, or in any case in which the company is defending under a reservation of rights, or in any case in which the prosecution of a counterclaim appears advantageous to the policyholder.⁹²

The principle is applicable to other conflicts of interest arising in the claims process and should be considered in that light as other sections of this present topic are discussed.

90. For cases illustrating this particular conflict of interest, see *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976); *Brohawn v. Transamerican Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975); *Utica Mut. Ins. Co. v. Cherry*, 45 App. Div. 2d 350, 358 N.Y.S.2d 519, *motion denied*, 68 Misc. 2d 514, 362 N.Y.S.2d 532, *order aff'd*, 38 N.Y.2d 735, 343 N.E.2d 758, 381 N.Y.S.2d 431 (1974).

91. 339 Mass. 184, 158 N.E.2d 338 (1959).

92. 7A J. APPLEMAN, *supra* note 1, § 4681 n. 9-15.

D. *Where Policy Limits Are Exhausted and the Insurer Has No Economic Interest*

As discussed in Part III, the insurer has an interest in controlling and defending any claim brought against its insured that could fall within the policy's coverage. However, if the policy limits have been paid or if a tender of settlement up to the policy's limits has occurred, the insurer's interest arguably disappears as the outcome of its potential liability cannot worsen. In a sense, this involves a problem at least akin to a conflict of interest—a lack of a sufficient interest.

It has been held that even where there is no actual conflict of interest present, if the insurer had no economic motive for a vigorous defense, the insured should not be required to give up control of the defense to the insurer.⁹³ Arguably, if the policy limits have been tendered or paid, such an economic motive is lacking and the insurer has no right to defend. This argument has been accepted in some jurisdictions even to the point where the duty to defend is said to be discharged.⁹⁴ However, there is a definite split of authority on the question and research indicates the question has not been judicially considered in Missouri.⁹⁵ Further, where the insurer lacks economic motive, it has been argued that to allow the insurer to control litigation is contrary to legal restraints against corporate practice of law.⁹⁶ Again, as one commentator puts it, "the point is debatable."⁹⁷ Naturally, the contents of the policy itself should be examined if the issue is present.

E. *Miscellaneous Situations Raising the Spector of a Conflict of Interest for the Insurer*

It is impossible to discuss all potential situations that could arise within the claims process that would place the insurer in a position of a conflict of interest. Additionally, there is a dearth of case law in Missouri on the problem. This subsection will simply make reference to other relevant Missouri cases and some other possible situations creating potential conflicts of interest for the insurer.

It has been asserted previously within this article that if the insurer is uncertain as to whether a claim falls within the coverage of its policy, it may proceed to defend under a reservation of rights or non-waiver agreement.⁹⁸ In a sense, this places the insurer in a posture that could potential-

93. See *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976).

94. See *Oda v. Highway Ins. Co.*, 44 Ill. App. 2d 235, 194 N.E.2d 489 (1963); R. KEETON, *supra* note 1, § 7.6(c).

95. See 14 R. Anderson, *supra* note 1, § 51:49; R. KEETON, *supra* note 1, § 7.6(c).

96. See 7A J. APPLEMAN, *supra* note 1, § 4682.

97. R. KEETON, *supra* note 1, § 7.1(c) at 480.

98. See discussion Part III *supra*.

ly conflict with the best interests of the insured. Thus, in Missouri where an insurer defends under a reservation of rights or a non-waiver agreement, it has no right to control the defense over the objection of the insured.⁹⁹

In Missouri, there is a special conflict of interest problem growing from an insurance claim dispute that directly affects the counsel selected by the insurer. The Missouri Supreme Court has held that where an attorney was selected by an *insurer* to represent both the company and the insured, and during the claim process it was determined the insurer had no liability, the insurance company's attorney could not properly go forward to represent the insured. The court held that continued representation would constitute unprofessional conduct because of the potential conflict of interest engendered by the situation.¹⁰⁰

Another problem results where there are multiple insurers interested in the defense of the same party in the same case. Since to exclude an insurer from the defense would be contrary to its legitimate interests in the defense of the claim, the multiple insurers are required to work together toward their common objective. In short, no one insurer can exclude another.¹⁰¹

Other conflicts of interest can be raised where multiple claims under a per accident limit of coverage are made by claimants, as settlement of one claim may exhaust or nearly exhaust the limit which would have an adverse impact on the total loss suffered by the insured above the limit of the policy; or where the settlement on one claim acts as a bar to a reciprocal claim; or where there are close relations between the insured and the claimant; or where uninsured motorist's coverage is involved and because of the relationship between the claim of the insured against the uninsured motorist to the claim of the uninsured motorist and others against the policyholder the conflict results. To do more than merely raise these possible conflicts of interest is beyond the scope of this article.¹⁰²

VI. DIRECT ACTIONS AND JOINDER OF THE LIABILITY INSURER¹⁰³

The insurer, being vitally interested in the proper defense and ultimate settlement of the claim, will normally involve itself in the claims process and will normally pay the claim if settlement occurs or a judgment against its insured is entered. However, if the liability insurer refuses

99. See *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974).

100. See *Helm v. Inter-Insurance Exch.*, 354 Mo. 935, 192 S.W.2d 417 (1946).

101. See *Krutsinger v. Illinois Cas. Co.*, 10 Ill. 2d 518, 141 N.E.2d 16 (1957).

102. For an excellent discussion of these problems, see R. KEETON, *supra* note 1, §§ 7.7, 7.9 & 7.10.

103. In other than liability insurance, the insured claimant can bring direct action against its insured provided all prerequisites within the policy have been complied with. For an excellent discussion of such direct actions, see Mo. Bar C.L.E., *Missouri Insurance Practice* §§ 11.2-.33 (2d ed. 1977). For an excellent discussion of direct actions against the liability insurer, see *id.* at §§ 11.34-.62.

liability from the outset, the question is often presented as to whether the injured claimant may sue the insurer directly by joining the insurer in the claimant's action against the insured.

Most liability policies do not allow such direct action, nor does the prevailing rule, whether judicial or statutory, allow direct action.¹⁰⁴ The principal reason for the policy clause or the judicial or legislative rule is to require adjudication of the tort action against the insured without involving the insurer as a party with resulting prejudice to the insurer before the jury.

The courts and the legislature in Missouri have adopted this principle. A judgment is necessary before an action can be brought directly against the insurer.¹⁰⁵ Once the judgment is obtained, the claimant has the choice between two possible avenues of recovery against the liability insurer.¹⁰⁶ Both avenues of recovery involve garnishment proceedings. So-called equitable garnishment can be pursued¹⁰⁷ or general garnishment procedures could be selected.¹⁰⁸ In any event, the tort claimant cannot seek direct recovery prior to judgment against the insurer.

VII. SUBROGATION

In some instances the insurer may be required to pay a claim and yet may have recourse against another party to recoup its "loss." This windfall right of some insurers is embodied in the concept known as subrogation.¹⁰⁹ The nature of and right to subrogation is hereinafter explored.

A. *The Theoretical Base and Limitations*

Subrogation gives to the insurer the right to recover its loss from the party who caused the loss irrespective of any contractual or any other legal relationship with the party who caused the loss. Otherwise stated, even though the insurer receives a premium from its insured as compensation

104. See J. APPLEMAN, *supra* note 1, §§ 4861-4866.25; R. KEETON, *supra* note 1, § 7.11 at 534-35.

105. See *Clarke v. Organ*, 329 S.W.2d 670 (Mo. 1960); *Cotton v. Iowa Mut. Liab. Ins. Co.*, 363 Mo. 430, 251 S.W.2d 246, *appeal transferred*, 260 S.W.2d 43 (K.C. Mo. App. 1952); *State ex rel. Anderson v. Dinwiddie*, 359 Mo. 980, 229 S.W.2d 985 (1949); *Haines v. Harrison*, 357 Mo. 956, 211 S.W.2d 489 (1948); *Martinelli v. Security Ins. Co.*, 490 S.W.2d 427 (Mo. App., D. St. L. 1972); *State ex rel. McCubbin v. McMillian*, 349 S.W.2d 453 (St. L. Mo. App. 1961); *Taverno v. American Auto Ins. Co.*, 232 Mo. App. 820, 112 S.W.2d 941 (K.C. 1938).

106. See *Pennsylvania Comity Co. v. Phoenix*, 139 F.2d 823 (10th Cir. 1944).

107. See RSMo § 379.200 (1969).

108. See RSMo ch. 525 (1969); Mo. R. Civ. P. 90.

109. For an excellent discussion of Missouri subrogation law, see Mo. Bar C.L.E., *Missouri Insurance Practice*, ch. 10 (2d ed. 1977). For a review of subrogation at the national level, see 7 J. APPLEMAN, *supra* note 1, §§ 4051-4054; 11 J. APPLEMAN, *supra* note 1, §§ 6501-6533; R. KEETON, *supra* note 1, § 3.10.

for its promise to pay the loss, the insurer in some situations can recover the amount of the claim from the party who caused the loss. Initially the right was one created by the court of equity that can exist even in the absence of a contractual provision providing for such.¹¹⁰ Under modern authority, any party who pursuant to a legal obligation has paid for an injury resulting from the wrong of another may be subrogated to the rights of the party to whom payment was made against the wrongdoer. The right is given to such a party because of his *secondary* liability.¹¹¹

There are some serious limitations to the insurer's right of subrogation. First, the insurer's right must be based on its secondary liability—the insurer cannot be a mere volunteer.¹¹² Second, the insurer cannot be subrogated against its own insured.¹¹³ To allow the insurer to subrogate against its own insured would obviously defeat the very purpose for which the insurance contract was made; but, the question of "who" the insured is in a given case may not be so obvious.¹¹⁴ Third, public policy in Missouri prohibits assignment of tort claims for personal injury (such as wrong done to the person, reputation, or feelings) and personal contracts (such as contracts in contemplation of marriage).¹¹⁵ Finally, in Missouri a cause of action cannot be split without permission of the defendant against whom the claim is asserted.¹¹⁶

With the aforesaid limitations on the right of subrogation in mind, it would be beneficial to delineate those insurers who may seek subrogation against a party who caused loss to their insured. The discussion is contained within a footnote and is limited to those insurers recognized to date by the Missouri courts or legislature as having a subrogation right.¹¹⁷

110. See *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 127 S.W. 72 (1909); *Knight v. Calvert Fire Ins. Co.*, 268 S.W.2d 53 (St. L. Mo. App. 1954).

111. See *Cole v. Morris*, 409 S.W.2d 668 (Mo. 1966).

112. See *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 127 S.W. 72 (1909).

113. See *State Farm Mut. Auto. Ins. Co. v. Central Sur. & Ins. Corp.*, 405 S.W.2d 530 (K.C. Mo. App. 1966); *Northwestern Mut. Ins. Co. v. Haglund*, 387 S.W.2d 230 (K.C. Mo. App. 1965).

114. See, e.g., cases cited note 113 *supra*.

115. See *Jones v. Aetna Cas. & Sur. Co.*, 497 S.W.2d 809 (Mo. App., D.K.C. 1973).

116. See *Subscribers at Cas. Reciprocal Exch. v. Kansas City Pub. Serv. Co.*, 230 Mo. App. 460, 91 S.W.2d 227 (K.C. 1936), *overruled on other grounds*, *Kaup v. Luthjohan*, 360 S.W.2d 321 (St. L. Mo. App. 1962).

117. Subrogation has been allowed in the following cases and situations: *Cole v. Morris*, 409 S.W.2d 668 (Mo. 1966) (workmen's compensation); *Lumberman's Mut. Ins. Co. v. Kansas City Ft. S. & M. Ry.*, 149 Mo. 165, 50 S.W. 281 (1899) (property insurance); *Cable v. St. Louis Marine Ry. & Dock Co.*, 21 Mo. 133 (1855) (property insurance); *Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105 (K.C. Mo. App. 1971) (uninsured motorist insurance); *General Exch. Ins. Corp. v. Young*, 206 S.W.2d 683 (St. L. Mo. App. 1947), *aff'd*, 212 S.W.2d 396 (Mo. 1948) (automobile insurance); *McKenzie v. Missouri Stables, Inc.*, 225 Mo. App. 64, 34 S.W.2d 136 (1930) (workmen's compensation); *Hartford Fire Ins. Co. v. Wabash Ry.*, 74 Mo. App. 106 (K.C. 1898); RSMo §

There are also some serious limitations on the right of subrogation even after the right has been properly exercised. The rights of the insurer against the party who caused the loss can be no greater than those of its insured to whose position the insurer is subrogated.¹¹⁸ Similarly, the insurer will be subject to the same defenses to which its insured was subject.¹¹⁹

B. *Enforcement of the Subrogation Right—Procedural Difficulties*

The insurer traditionally has tried to keep its name out of lawsuits. The principal reason for this reluctance to be the named plaintiff in a subrogation suit is that the jury might be unduly prejudiced against allowing recovery by an insurance company against an individual defendant. The question of when the insured must be a party to the subrogation action is of great interest and has been often litigated in Missouri.

The mere exercise of the insurer's right of subrogation is not sufficient to make the insurer a necessary party to the subrogation action; instead, there must be a full assignment of the insured's claim to the insurer. If there is full assignment, the insurer must be the named plaintiff.¹²⁰ In other words, if there is no assignment, or if the assignment is incomplete, the insured is the real party in interest; if the assignment is complete, the insurer is the real party in interest.¹²¹

Mention should be made of special problems that have developed in this field. When the loss is covered by more than one insurer and all in-

430.350 (1969) (where a surety pays the state); RSMo §§ 430.230-.250 (Supp. 1975) (hospital "liens"); RSMo § 379.203(4) (Supp. 1975) (uninsured motorist insurance).

Subrogation has been denied in the following cases and situations: *Jones v. Aetna Cas. & Sur. Co.*, 497 S.W.2d 809 (Mo. App. 1973) (medical insurance); *MFA Mut. Ins. Co. v. Huddleston*, 459 S.W.2d 104 (K.C. Mo. App. 1970) (standard mortgage clause in a fire insurance policy does not give mortgagee right of subrogation where note and mortgage are not in default); *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208 (St. L. Mo. App. 1967) (funeral benefits); *State Farm Mut. Auto. Ins. Co. v. Central Sur. & Ins. Corp.*, 405 S.W.2d 530 (K.C. Mo. App. 1966) (automobile insurance—subrogation against permissive user); *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418 (Spr. Mo. App. 1965) (medical insurance); *Northwestern Mut. Ins. Co. v. Haglund*, 387 S.W.2d 230 (K.C. Mo. App. 1965) (automobile insurance—subrogation against permissive user).

118. See *Monsanto Chem. Co. v. American Bituminuls Co.*, 249 S.W.2d 428 (Mo. 1952).

119. See *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973).

120. See *Steele v. Goosen*, 329 S.W.2d 703 (Mo. 1959); *American Family Ins. Group v. Wilcoxson*, 572 S.W.2d 222 (Mo. App., D.K.C. 1978); *State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832 (Mo. App., D.K.C. 1975); *Bauer v. Holtkamp*, 389 S.W.2d 850 (St. L. Mo. App. 1965); *Hayes v. Jenkins*, 337 S.W.2d 259 (Spr. Mo. App. 1960). See also RSMo § 507.010 (1969); Mo. R. Civ. P. 52.01.

121. See *State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832 (Mo. App., D.K.C. 1975); RSMo § 507.010 (1969); Mo. R. Civ. P. 52.01.

surers join to pay the claim, the assignment of the insured's claim will be split among the various insurers. In such a situation, Missouri allows the subrogation action to be brought in the name of the insured.¹²² Another special problem develops where the insured has released the party who caused the loss against whom the insurer wishes to subrogate. If such occurs where the tort-feasor knew of the possible subrogation, the insurer's subrogation right is unaffected at least where it did not give its consent.¹²³ However, if the tort-feasor was unaware of the potential subrogation claim and the release makes no provision for such, the insurer loses its right to subrogation altogether.¹²⁴

VIII. CONCLUSION

For the lawyer whose practice is not confined to the insurance claims field, the insurance claims process presents a formidable body of law to be dealt with. Although this article has not sought to critically analyze insurance claims law or exhaustively list the cases in this area, it does outline the insurance claims process and the important decisions and statutes regarding it. This article is intended as a tool for the practitioner and by its use it is hoped the Missouri practitioner will be able to more effectively deal with the insurance claims process when he encounters it in his practice.

122. See *Liebstadter v. Brooks*, 421 S.W.2d 547 (K.C. Mo. App. 1967); *Swift & Co. v. Wabash Ry.*, 149 Mo. App. 526, 131 S.W. 124 (K.C. 1910).

123. See *General Exch. Ins. Corp. v. Young*, 212 S.W.2d 396 (Mo. 1948); *Farm Bureau Mut. Ins. Co. v. Anderson*, 360 S.W.2d 314 (St. L. Mo. App. 1962).

124. See *Farm Bureau Mut. Ins. Co. v. Anderson*, 360 S.W.2d 314 (St. L. Mo. App. 1962).